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Nos. 373, 380, 385

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

PEOPLE OF THE STATE OF CALIFORNIA, ET AL., *Petitioners*
v.
PHILLIPS PETROLEUM COMPANY, ET AL.

PACIFIC GAS AND ELECTRIC COMPANY, ET AL., *Petitioners*
v.
PHILLIPS PETROLEUM COMPANY, ET AL.

FEDERAL POWER COMMISSION, *Petitioner*
v.
PHILLIPS PETROLEUM COMPANY, ET AL.

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT MOBIL OIL CORPORATION

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## BRIEF IN OPPOSITION OF RESPONDENT MOBIL OIL CORPORATION

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Mobil Oil Corporation (Mobil) submits this single brief in opposition to the petitions in the above-captioned cases, but at the outset expresses its agreement

with Petitioners in Nos. 373 and 385 that the petitions should be held pending final decision in *The Permian Basin Area Rate Cases,* Nos. 90, *et al.,* this Term. Thereafter, if the Commission is affirmed in *The Permian Basin Area Rate Cases,* the petitions should be granted, and this case remanded to the Court of Appeals for a decision upon all substantive issues in light of this Court's decision in *The Permian Basin Area Rate Cases.* However, if the Commission is reversed in whole or in part in *The Permian Basin Area Rate Cases,* the petitions should be granted, and this case remanded to the Commission for an initial administrative determination in light of this Court's opinion in *The Permian Basin Area Rate Cases.*

## OPINIONS BELOW

The opinion of the Court of Appeals, reproduced in Appendix A to the petition in No. 373, is reported at 377 F. 2d 278. The opinions and orders of the Federal Power Commission (J.A. 143-158 and 216-224) are reported at 35 F.P.C. 40 and 35 F.P.C. 321.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions.

## STATUTE INVOLVED

The statute involved is Section 7(c) and 7(e) of the Natural Gas Act, 52 Stat. 822, as amended 56 Stat. 83, 84, 15 U.S.C. §§ 717f(e), reproduced at pp. 2-4 of the petition in No. 373.

## QUESTIONS PRESENTED

1. Whether the requirements of Section 7 of the Natural Gas Act and due process of law are met and accorded when the Federal Power Commission auto-

matically applies an "area rate" previously determined under Sections 4 and 5 of the Act to a natural gas sale and application for Section 7 certification initiated after the test year upon which the prior "area rate" is based.

2. Whether the "present and future public convenience and necessity" standard of Section 7 is lawfully applied and due process is accorded when the Commission refuses to consider in a Section 7 proceeding evidence of present and future conditions which update data used in determining a prior "area rate."

3. Assuming the pre-fixed "area rate" may be so applied in subsequent Section 7 cases, whether an "old gas" rate made applicable by the Commission to sales under contracts executed prior to January 1, 1961, lawfully may be imposed as a "conditioned price" applicable to a sale under a contract dated December 28, 1960, but in fact executed on March 2 and 3, 1961, and thus eligible for a "new gas" rate under the Commission's area rate system.[1]

4. Whether the moratorium imposed by the Commission on rate filings in granting this Section 7 certificate is allowable and reasonable.

## STATEMENT OF THE CASE

This case involves validity of "conditions" imposed upon a certificate of public convenience and necessity issued to Mobil as an independent producer

[1] If the Commission were affirmed on the first three questions, this case would present the question of whether a retroactive refund liability imposed upon Mobil by the Commission for amounts collected under a Section 7 temporary certificate is allowable and reasonable in this case.

and seller of natural gas under Section 7 of the Natural Gas Act. Pursuant to a temporary certificate issued by the Commission in 1962, Mobil initiated the sale from the Rojo Caballos Field, Pecos County, Texas, which is in the Permian Basin area. The temporary certificate issued by the Commission did not permit sale at the proposed contract price of 18 cents per Mcf, but contained a Commission-prescribed rate of 16 cents per Mcf and *no* provision for or imposition of contingent liability as to possible future refunds of amounts collected at this 16 cent rate.

This sale was continuing on the basis of the temporary certificate and Mobil's application for a permanent certificate was still pending when the Commission issued its Opinion No. 468 in the Permian Basin Area Rate Case on August 5, 1965, prescribing, *inter alia,* a dual-price system of rates for sales in this area on the basis of 1960 cost data adduced in the area rate case. In particulars here pertinent to the "premium quality" gas delivered by Mobil, this system established a rate of 16.5 cents per Mcf for sales of "new gas" under contracts executed on or after January 1, 1961, and a lower rate of 14.5 cents per Mcf for sales of "old gas" under contracts executed prior to that date.

Hearings on Mobil's application and those of other producers in the same general area for a permanent certificate commenced under Section 7 after issuance of Opinion No. 468. At the hearing, producers attempted to present evidence updating the 1960 data upon which the Opinion No. 468 "area rates" were based. In addition, Mobil showed, through a witness

and documentary evidence confirmed by its pipeline purchaser and not cross-examined by counsel for Commission Staff or other parties, that even though its contract was mistakenly dated December 28, 1960, the contract actually was executed on March 2 and 3, 1961, and thus was a contract eligible for the rate of 16.5 cents per Mcf if the Opinion No. 468 system should be applied to impose price "conditions" in the permanent certificate to be issued under Section 7.

After procedures not pertinent here, the Commission issued its decision under Section 7, denoted Opinion No. 484, on January 6, 1966. The Commission (1) affirmed exclusion of all evidence tendered to update the *1960* data upon which the "area rates" in Opinion No. 468 had been prescribed in the earlier "area rate" case; (2) mechanically applied this Opinion No. 468 pricing system to prescribe "conditioned prices" for all certificates issued in this case; (3) refused to consider the evidence as to true execution date of Mobil's contract and its eligibility for the "new gas" price and imposed an "old gas" price of 14.5 cents for this sale; (4) imposed a new, retroactive contingent liability of refunds by Mobil for the difference between this 14.5 cents and amounts collected at 16 cents under the no-refund conditioned certificate previously issued in 1962; and (5) ordered an absolute "moratorium" upon any increase of rates until January 1, 1968.

All such conclusions and "conditions" were challenged by applications for rehearing, and Mobil appended to its application an amendment to its contract executed by the parties to reflect the true execution

date of March 3, 1961. However, the Commission again refused to consider this evidence and denied rehearing.[2]

Mobil and others thereupon sought review under Section 19(b) of the Act, raising as issues validity of each of the Commission's five conclusions and "conditions" enumerated, *supra*. However, prior to the decision by the Court of Appeals, that court reversed and remanded the Commission's Opinion No. 468 (see petitions in *The Permian Basin Area Rate Cases*, Nos. 90, *et al.*, this Term). Therefore, in the instant case, the Court of Appeals granted the petitions for review, but did not pass on the merits of the issues before it, and remanded the case for further proceedings. The Court, noting that the issues raised are "hypothetical" at the moment, stated:

> "When area rates for the Permian Basin area receive final judicial approval, the issues presented will be ripe for decision. If we were to decide them now, we would be rendering an advisory opinion. We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected."

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[2] Commissioner Bagge dissented as to Commission refusal to consider evidence as to the date of execution of Mobil's contract (J.A. 219-224). The Commission also denied stay pending review, but stay was subsequently granted by the Court of Appeals. Mobil's sale thus is continuing pursuant to the temporary certificate issued in 1962, pending completion of these review proceedings.

## ARGUMENT

Depending upon this Court's decision in *The Permian Basin Area Rate Cases,* one of the two following procedures should be followed by this Court in regard to these petitions.

### A. Should This Court Affirm the Commission in the Permian Basin Area Rate Cases, Then the Petitions Should Be Granted and the Case Remanded to the Court of Appeals.

As each Petitioner correctly recites, the Court of Appeals did not pass on the merits of any of the issues presented to it in this case. Accordingly, Mobil agrees with its understanding of the requests of the People of the State of California, *et al.,* and the Federal Power Commission in Nos. 373 and 385 to the effect that if this Court affirms the Commission in *The Permian Basin Area Rate Cases* the petitions should be granted, and the case should be remanded to the Court of Appeals for a decision by that court upon all issues presented, but not decided by that court in its initial opinion in this case by reason of its prior reversal of certain portions of the Commission's decision in *The Permian Basin Area Rate Cases.*

Contrary to this position, Petitioners in No. 380, Pacific Gas and Electric Company, *et al.,* imply that this Court should proceed to hear and decide the instant case without regard to the pendency or the outcome of *The Permian Basin Area Rate Cases.* Such action by this Court is not practicable without knowledge of the disposition of *The Permian Basin Area Rate Cases.* Such action would deprive Mobil of the review guaranteed by Section 19(b) of the Act of the issues presented to but not acted upon by the

Court of Appeals, and would require this Court to proceed *de novo* into the complex issues and record without the benefit of an opinion by the Court of Appeals. The course of action proposed by Petitioners in No. 380 would thus be violative of this Court's general practice not "to review an administrative record in the first instance."[3] Thus, Mobil opposes what appear to be the suggestions of Petitioners in No. 380 and joins Petitioners in No. 373 and the Federal Power Commission in No. 385 in requesting that if the Commission is affirmed in *The Permian Basin Area Rate Cases,* these petitions should be granted and this case remanded to the Court of Appeals for consideration there of all issues in light of this Court's opinion in *The Permian Basin Area Rate Cases.*

**B. Should This Court Reverse the Commission in Whole or in Part in the Permian Basin Area Rate Cases, Then This Court Should Grant These Petitions and Remand the Case to the Commission for Consideration of the Issues Raised in Light of This Court's Opinion in the Permian Basin Area Rate Cases.**

A decision by this Court in *The Permian Basin Area Rate Cases* reversing the Commission in whole or in part will make reconsideration by the Commission of its initial decision in this case, which was based on the assumed validity of its entire opinion in *The Permian Basin Area Rate Cases,* a necessity in order that the Commission's decision will conform to this Court's decision in *The Permian Basin Area Rate Cases.*

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[3] *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 578 (1952). See also *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154, 157 (1965).

Should this Court attempt to decide the issues here presented after a reversal of the Commission in *The Permian Basin Area Rate Cases,* in whole or in part, this Court would be displacing the role Congress has entrusted to the Commission under the Natural Gas Act in making initial administrative determinations. Should this Court remand the case to the Court of Appeals after reversal of the Commission in whole or in part, that court too would be faced with making an initial administrative determination.

Petitioners in No. 373 and No. 385 again seem to support this suggested procedure. The request of Petitioners in No. 380 would seem to require that this Court make initial administrative determinations should it reverse the Commission in whole or in part in *The Permian Basin Area Rate Cases.* Mobil respectfully submits that this is not the proper role or function of this Court.

## CONCLUSION

For the foregoing reasons, the petitions should be held pending this Court's decision in *The Permian Basin Area Rate Cases,* Nos. 90, *et al.,* this Term. Thereafter, if the Commission is affirmed in *The Permian Basin Area Rate Cases,* the petitions should be granted and this case remanded to the Court of Appeals for consideration on the merits of the issues there presented in light of this Court's decision in *The Permian Basin Area Rate Cases.* However, should this Court reverse the Commission, in whole or in part, in *The Permian Basin Area Rate Cases,* then this Court should grant these petitions and remand the case to the Commission for a redetermination by it of the

issues involved in light of this Court's decision in *The Permian Basin Area Rate Cases.*

Respectfully submitted,

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